meaning of section 4 of the Judgments Extension Act, 1868. Esher, M.R., says at pp. 23 — 24 :—

"Section 4 says that the English Court is to exercise over a registered Irish judgment the same jurisdiction as it has over an English judgment, 'but in so far only as relates to execution under this Act.' The appellants have endeavoured to get rid of the words 'under this Act.' But, even if those words are omitted, the power of the Court is limited to 'execution.' Is the power which is conferred by section 5 of the Debtors Act, 1869, of committing a defaulting debtor to prison, 'execution'? It has been expressly decided in **Stonor v. Fowle**, 13 A.C. 20, that it is not, and the point hardly needed authority. Moreover, section 5 of the Debtors Act expressly provides that, when the creditor has done all that he can to enforce the remedies given to him by that section, his right to execution on the judgment remains untouched. It is as clear as can well be that the power of committing a debtor, or of ordering him to pay by instalments, is not 'execution,' and, if so, the Judgments Extension Act does not authorize the Court to employ that power for the purpose of enforcing an Irish judgment registered in England."

Lopes, L.J., says, at pp. 24 — 25 :—

"It seems to me impossible to say that the procedure by judgment summons under the Debtors Act is 'execution under this Act,' that is, under the Act of 1868. Indeed, I think it is not 'execution' at all. It was decided in **Stonor v. Fowle**, 13 A.C. 20, that such a proceeding is in its nature punitive, and is not a mere mode of enforcing payment of the debt. It cannot, therefore, be 'execution.' Then section 5 of the Debtors Act says, that 'No imprisonment under this section shall operate as a satisfaction of any debt, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place.' It is clear, therefore, that if proceedings are taken under the Debtors Act, and an order for committal is made, and the debtor is imprisoned for six weeks, the right of 'execution' still remains, and a fi. fa. can issue upon the judgment, if the debtor has any goods. This makes it quite plain that this proceeding under the Debtors Act is not 'execution' under the Act of 1868."

In *Montgomery & Co. v. De Bulmes*[3], it was held that if a creditor, who has recovered judgment against his debtor in the High Court, afterwards obtains from a county court judge an order under section 5 of the Debtors Act, 1869, for payment of the debt by instalments, he cannot, so long as that order is in force, issue execution upon his judgment in the High Court. In the course of his judgment Chitty, L.J., says, at p. 423 :—

"In this case the plaintiffs did not see their way to obtaining execution, and they thought that this (i.e. putting in motion section 5 of the Debtors Act, 1869) was the best way of getting their money."

Clearly, therefore, the learned Lord Justice was of the same opinion as the Court in the earlier case, that the procedure under section 5 of the Debtors Act, 1869, is not execution. Collins, L.J., agreed with this opinion.

In a later case, however, a contrary opinion was expressed. In *Bundy v. Motor Cab Owner Drivers' Association & Ors.*[4], it was held *inter alia* that procedure by judgment summons is a mode of enforcing a judgment and directly in connection with the action, as distinguished from a bankruptcy petition, which is not. The following words appear in the judgment of Talbot and Finlay, JJ., at p. 336 :—

"The section (i.e. section 5 of the Debtors Act, 1869) empowers the court to direct a judgment debtor to pay by instalments. It is plain that this procedure is in truth a form of execution introduced by successive statutes in connection with the abolition in all ordinary cases of the old execution by caveat. It is a mode of enforcing the judgment."

Mills, J., in the case of *Velathan v. Chinniah*[1], considered the earlier decisions the weightier authorities and followed them. I respectfully agree. I think that it is perfectly plain that what is known locally as the procedure by judgment debtor summons is not execution, but a method of discovery only. It may be followed by execution if sufficient assets are discovered; or resort to execution may be avoided if the judgment debtor pays the decretal amount by instalments; or the decree-holder may not proceed to execution if no assets are discovered.

I considered that the words "shall not be recognised ..... by any Court executing the decree" in section 241 (iii) of the Civil Procedure Code must be taken to mean what they say, and that the prohibition contained in the sub-section applies only in cases where the decree-holder has applied for execution of the decree. It follows that if the Court is satisfied at the hearing of the judgment debtor summons that the amount due has in fact been paid, it must be empowered to refuse to examine the debtor as to his ability to pay a debt which has already been paid.

I would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellant : *Bannon & Bailey.*

Solicitors for the respondents : *Braddell & Ramani.*

LOW MOH & ANOR. v. PUBLIC PROSECUTOR.

[A. Cr. J. (Bellamy, J.) October 29, 1953]

[K.L. — Criminal Appeal No. 35 of 1953]

Road Traffic — Motor Vehicles (Construction and use) Regulations, 1948 — Using a vehicle on the road with inefficient brakes — Whether trial Judge can impart his own knowledge into the case.

This was an appeal against the conviction of the appellants on charges of offences under the Motor Vehicles (Construction and Use) Regulations, 1948. The questions raised on the appeal were: (a) whether any person can be guilty of the offence of permitting a vehicle to be used on a road with brakes which are not maintained in good and efficient working order and improperly adjusted; (b) whether there was sufficient evidence to show that the appellants had used the vehicle in contravention of the regulations.

Held: (1) there is no offence known to the law of permitting the use of a vehicle on a road in contravention of the provisions of Regulation 98, and therefore the conviction on the charge of "permitting" the vehicles to be so used must be set aside; (2) the evidence in this case did not show that the offence under Regulation 98

of the Motor Vehicles (Construction and Use) Regulations 1948 had been committed by the appellants.

Semble: A Judge cannot without giving evidence as a witness impart into a case his own knowledge of particular facts.

Cases referred to :—

(1) *Griffiths v. Studebakers Ltd.* (1924) 1 K.B. 102.

(2) *Public Prosecutor v. Chua Yeoh Pan* (1950) M.L.J. 225.

(3) *Harpushad v. Sheo Dyal* (1876) L.R. 3 I.A. 259.

CRIMINAL APPEAL.

Cur. Adv. Vult.

Bellamy, J. : — In this case the first appellant is the owner of a motor vehicle which, whilst being driven by the second appellant, left the road and came to rest against a house fronting on the road, in its course colliding with, and fatally injuring, a pedal cyclist. Subsequently, on the 26th March, 1953, the appellants appeared before the President of the Sessions Court, Kuala Lumpur on the following charges respectively :—

"That you on 26th December, 1952 at 9.30 a.m. at Klang Road, Kuala Lumpur, being the owner of motor lorry No. BA. 8228, did permit the said vehicle to be used on the public road with the foot brake and the means of operation thereof not being maintained in good and efficient working order and not properly adjusted, thereby causing the vehicle to swing violently to the nearside on application of the foot brake pedal, and that you have thereby committed an offence under section 98 of the Motor Vehicles (C. & U.) Regulations and punishable under section 8(1) of the R.T.P. 17/45."

And,

"That you on 26th December, 1952 at 9.00 a.m. at Klang Road, Kuala Lumpur, being the driver of motor lorry No. BA. 8228, did use the said motor vehicle on the public road with the foot brake and the means of operation thereof not being maintained in good and efficient working order and not properly adjusted, thereby causing the vehicle to swing violently to the nearside on application of the foot brake pedal, and that you have thereby committed an offence under section 98 of the Motor Vehicles (C. & U.) Regulations and punishable under section 8(1) of the R.T.P. 17/45."

The appellants pleaded Not Guilty. They were tried jointly and found guilty as charged and convicted, and each appellant was fined $500 and ordered to pay costs in the sum of $100, in default of payment of the fine and costs, to undergo six months' imprisonment. They now appeal against such decision.

The first question to be considered, although it was not raised in the lower Court and was not argued before me, is, I think, can any person, whether he is the owner or the driver of a motor vehicle, be guilty of an offence of "permitting" such a vehicle to be used on a road with brakes which are not maintained in good and efficient working order and improperly adjusted?

Regulation 98 in Part V of the Motor Vehicles (Construction and Use) Regulations, 1948, under which the charges against the appellants were laid, provides as follows :—

98. "Every windscreen wiper required by these Regulations to be fitted to a motor vehicle and every part of every braking system and of the means of operation thereof fitted to a motor vehicle or trailer, and all steering gear fitted to a motor vehicle shall at all times, while the motor vehicle or trailer is used on a road be maintained in good and efficient working order and shall be properly adjusted."

It is clear that this regulation imposes an absolute duty on the owner of a motor vehicle that if such a vehicle is used upon any road it must, amongst other things, be equipped with brakes which are maintained in good and efficient working order and properly adjusted. But regulation 98 is, equally clearly, not by itself a penal regulation. A breach of the provisions of this regulation is punishable under section 8(1) of the Road Transport Proclamation which reads :—

8(1). "Any person who without lawful excuse acts in contravention of or fails to comply with any provision of this Proclamation or of any regulation made thereunder shall be liable, where no special penalty is provided, in the case of the first offence, to a fine of five hundred dollars or to imprisonment for a term not exceeding six months and, in the case of a second or subsequent offence to a fine of one thousand dollars or to imprisonment for a term of one year, or to both such fine and imprisonment."

The regulations contained in Part V of the Motor Vehicles (Construction and Use) Regulations, 1948, which is that Part of this code of regulations relating to the user of all motor vehicles and trailers, distinguish in several places between "using", "causing", "suffering" and "permitting" (see, for example, regulations 99(1), 105(1), 107 and 109); they distinguish between "driving" and "using" (regulation 103); they impose specific duties on owners of vehicles or trailers (regulations 87, 88, 89 and 90), and also on drivers and persons in charge of vehicles or trailers (regulations 106, 109, 110, 111, 112, 113 and 114). Looking at the language of regulation 98, we find firstly, that no specific obligation is cast on any named person, and secondly, that words like "causing", "suffering" and "permitting" are omitted. Turning to section 8(1) of the Road Transport Proclamation, which is a general penal section, we find that such words are also omitted. It is, therefore, perfectly clear that regulation 98, read with section 8(1) of the Road Transport Proclamation, contemplates possible offences of "using" a motor vehicle or trailer on a roadway in breach of the provisions of that regulation, and that it does not contemplate offences of "causing", "suffering" or "permitting" such user. To hold otherwise section 8(1) would have to be read: "Any person who without lawful excuse acts in contravention of or fails to comply with *or causes or suffers or permits any*

breach of any provision of this Proclamation or of any regulation made thereunder shall be liable ....." That is not what the section says.

In my opinion, there is no offence known to the law of "permitting" the use of a vehicle on a road in contravention of the provisions of regulation 98, and it follows that in my judgment the answer to this first question is in the negative.

The result is that the charge against the first appellant in this case of "permitting" the vehicle in question to be used on a road with brakes which were not maintained in good and efficient working order and not properly adjusted under regulation 98 of the Motor Vehicles (Construction and Use) Regulations, 1948 and punishable under section 8(1) of the Road Transport Proclamation is bad, and the order of conviction thereon must be set aside.

Undoubtedly the first appellant could have been charged and convicted of "using" such a vehicle in contravention of the regulation, as was the second appellant, the driver of the vehicle (see *Griffiths v. Studebakers Ltd.*[1], which was applied by Pretheroe, J. in *Public Prosecutor v. Chua Yeoh Pan*[2]) and it is open to this Court, if it is satisfied that such an offence has been established, to direct that a conviction in such terms be substituted in place of that entered by the learned trial President.

The facts, which in the main are not in dispute, are that on the 26th December, 1952 the second appellant drove a lorry owned by the first appellant to a rice mill in Klang Road at Kuala Lumpur and, having there loaded it with fifty bags of rice, was returning on the Klang Road when he had occasion to apply the brakes hard which caused the lorry to swerve to the left. In the result the lorry, having struck a pedal cyclist who was thrown down and fatally injured, left the road, travelled across a drain three feet deep, and eventually came to rest in the kitchen of a house fronting on the roadway. At the time of the accident the road was dry and its surface good. There were tyre marks on the road which were made by the lorry in question measuring twenty-two feet long on the right and eighteen feet on the left, and these tyre marks were of equal intensity. Later the same afternoon the lorry was tested and inspected by an Assistant Examiner of the Road Transport Department at Kuala Lumpur. The Examiner's inspection, which consisted of a cursory examination *inter alia* of the underside of the vehicle and did not include a dismantling of the brakes or any one of them or of any part thereof to ascertain if there were any faults or breakages, showed that the lorry was equipped with a system of hydraulic four-wheel brakes and that this braking system was complete to all four brakes. The examiner carried out his tests on the road, and for these tests the lorry was driven unladen. It was found that, using the Ferrodo brake test, the efficiency of the foot brake was 54% which, in the view of the Road Transport authorities, is satisfactory. It was furthermore found that by applying the foot brake normally the lorry did not swerve, but that by applying the foot brake hard when travelling at a speed of 25 miles per hour the lorry swerved violently to the left, and in fact during this test left the road. Accordingly, the Examiner put a prohibition order on the lorry. On the same day the first appellant sent the lorry to Leng Huat Garage for inspection and repair. There the braking system of the lorry was dismantled, and it was found that the metal of the cylinder of the left front wheel brake drum was cracked and that a certain part, numbered 7166 in the instruction book, had snapped in two. Apart from these faults, nothing was found to be wrong with the braking system of the lorry. In these circumstances the matter came before the Sessions Court.

The crux of the case was whether the swerve to the left, indubitably violent and therefore a source of danger to other road users, upon the foot brake being applied hard was due to a failure on the part of the appellant, and in particular the first appellant, the owner of the lorry, to maintain the braking system of the lorry in good and efficient working order and properly adjusted as alleged by the prosecution or was due to a sudden breaking of a part of that braking system as alleged by the appellants.

The Assistant Examiner gave evidence as to his inspection and testing of the lorry. According to him, using the Ferrodo brake test, the foot brake gave 54% on two tests, a percentage of efficiency regarded as "satisfactory" to his department. He also stated that when he applied the brakes "ordinarily" the lorry did not swerve, but that when he drove the lorry up to 25 miles per hour and then "braked hard" the lorry swerved violently to the left, and it left the roadway. He stated that the brakes had not been adjusted properly, that their "balance was out", and that "the lack of adjustment was in the nearside front wheel". He also said this :—

> "There was nothing that I could find which would indicate that the brakes pulled to the left because of the accident. The brakes are hydraulic. The brakes were not taken down by me. I did not consider what the cause was. It might have been oil or water over a period, but I was of the opinion it was lack of maintenance. I tested the lorry unladen. I do not consider the load would aggravate the swerve. I got under the vehicle to inspect the brakes. There was no sign of damage that I could see."

He also stated that he did not consider that "a broken spring would suddenly go" and that he did not "think

it possible that this could be a sudden failure". The first appellant, the owner of the lorry, himself gave evidence that the lorry was maintained in good order. It had been sent to Leng Huat Garage on or about 28the November, 1952 for general repairs, and on the 26th December, 1952, before the lorry went out, he said he examined it and that "it seemed to be in good order". The second appellant, the driver of the lorry, also gave evidence, and he swore that on the day that he drove the lorry for the rice (that is, 26th December, 1952) the brakes were working efficiently. He also stated in evidence that he applied the brakes hard and swerved to avoid a woman cyclist because of a car coming in the opposite direction and that the lorry went out of control. According to him, he thought that the braking system was out of order. The appellants also called a fitter, one Ah Leng, from Leng Huat garage who stated in evidence that he had checked the braking system of the lorry when carrying out general repairs to it on or about the 28th November, 1952 and that the braking system was then in order. He also gave evidence as to his examination of the brakes after the accident, on the 26th December, 1952, as to which he said this :—

"I did the work. After the accident we dismantled the braking system. The metal of the cylinder of the left front wheel brake drum was cracked. The part 7166 (indicated in the instruction book) was broken. It was made of metal. It was snapped in two. This increased the force of the braking. There was nothing else wrong with it."

As to the defects he found, this witness said he was unable to say whether they were new or old. The appellants also produced in evidence two bills submitted to the first appellant by the Leng Huat garage in respect of the repair work done to the lorry in question by them on the 28th November, 1952 and 26th December, 1952 as confirmation of the evidence of the fitter, Ah Leng.

In his grounds of decision the learned President finds as a fact that, since there was a pull to the left in a hydraulic system, the brakes of that system had not been properly maintained. He records that he rejected the evidence of the fitter, Ah Leng, and sets out his reasons for so doing. After passing certain strictures on the Road Transport Department for having returned the lorry to the appellants without having first stripped and examined its braking system, the learned President states in this connection :—

"The only evidence (for what it is worth) that is available therefore is a Chinese mechanic of a Chinese firm employed by the accused who said in evidence that the cylinder in the brake drum concerned was cracked but failed to produce the part. He tried to identify the part from the Instruction Book, but the part he did identify was not the cylinder..... The only evidence therefore is that of P.W. 4 who gave the vehicle a road test. From this test there evolved two facts; firstly the hydraulic system was working to all four brakes and secondly that when the brakes were applied hard there was a dangerous swerve to the left. If the left front drum cylinder were cracked, there would have been no swerve to the left because the fluid would be escaping and the pressure would not be acting on the pistons. I therefore reject the evidence of the defence witness 3."

And, later in his grounds of decision he goes on :—

"It is true that some of the rubber washers might have perished but that takes place over a long period and if that were so there would have been a drag on the brakes which the driver must have felt for some time. But the Defence Witness 3 says all that was wrong was that the cylinder was cracked. I agree that the part to which he pointed was not the cylinder. I saw him in the box. I formed the opinion that he had not the least idea to what he was pointing when he was shown the Instruction Book."

On this I remark that there was no evidence before the learned President to support his conclusion that, if the left front drum cylinder were cracked (which is what the witness Ah Leng had sworn he had found), "there would have been no swerve to the left because the fluid would be escaping and the pressure would not be acting on the pistons"; that the evidence of the said Ah Leng, who was the only person who had dismantled and examined the braking system of the lorry, was not only "the only evidence" available but it was the best evidence of the condition of the braking system of the lorry, not, it is true, at the time of the accident but at or about the time that the lorry was tested by the Assistant Examiner; that the evidence of the said Ah Leng was unchallenged and uncontradicted, and the fact that he had carried out repairs to the lorry on the day of the accident was supported by the bill of his garage. The Assistant Examiner frankly admitted that he did not take down the brakes and that he merely "got under the vehicle to inspect the brakes" and from what he could see there was no sign of damage. I frankly cannot see that the Assistant Examiners road test affords any ground for distrusting the evidence of Ah Leng. His inspection of the lorry, in my view, affords none whatsoever. The result to which I am driven is that there is no satisfactory reason shown for rejecting the evidence of this witness called for the defence.

It is, I think, clear from the grounds of decision of the learned President that he did not base his decision on the evidence before him and two of the appellants' grounds of appeal are that the learned President made several assumptions that were not justified, and that he deduced from the evidence of the Assistant Examiner (P.W. 4) more facts in favour of the prosecution than that evidence justified. On this the relevant passages in the grounds of decision are these :—

"5. In this case, one is left with one's own knowledge of the mechanical workings of the standard hydraulic brake and the inescapable fact that the vehicle suddenly swerved off the road and was afterwards found

to have a bad pull to the left. In the first place it is common knowledge that brakes in normal conditions and under normal use do not suddenly go wrong without previous warning and in the second place the driver having been the regular driver of the vehicle must prior to the accident have noticed that there was a pull. I do not believe him when he says that the brakes were in order. The fact that P.W. 4 noticed nothing when testing the vehicle unladen in the Batu Road is a very different proposition than driving a laden lorry in the Klang Road."

"If a vehicle is heavily laden the pressure on the brake pedal to reduce speed must be proportionately heavier. That may well be why P.W. 4 did not notice anything because he tested the vehicle unladen."

Considering the latter passage first, when one checks this by an examination of the evidence of the Assistant Examiner (P.W. 4) one finds that what that witness said was that he did "not consider the load would aggravate the swerve."

It is an elementary proposition of law, too frequently overlooked with resulting confusion and possible injustice, that cases must be decided on the evidence and that the evidence must be such as is relevant and admissible under the Evidence Ordinance, that is, it must be either from admitted documents or the statements of witnesses or be something of which the Court can take judicial notice. The mechanical working of the braking system of a motor vehicle, albeit the standard hydraulic brake, and how such a braking system operates or fails to operate under normal conditions are not matters of which the Court can take judicial notice under the Evidence Ordinance. These are matters which must be proved as facts. In *Harpushad v. Shoe Dyal*[3], their Lordships of the Privy Council said :—

"A Judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts."

The learned President clearly, in my view, misdirected himself in importing into the case his own knowledge of matters of which there was not a shred of evidence before him.

It is well-established that although an appellate Court is slow to interfere with the findings of fact by a lower Court yet if it is convinced that the findings of the lower Court are ill-founded in the sense that they are based on some wrong principle of law or are against the weight of evidence it is bound to do so. I am satisfied here, for the reasons hereinbefore set forth, that the finding of fact that the brakes of the lorry had not been properly maintained cannot stand.

On a critical examination of the whole of the evidence I consider that the evidence did not prove beyond all reasonable doubt that the offence under regulation 98 of the Motor Vehicles (Construction and Use) Regulation, 1948 had been committed by the appellants.

For these reasons, I am of opinion that the appeal must be allowed, and the conviction and sentence of each of the appellants is set aside. The fines and costs, which I am informed have been paid by the appellants, must be refunded.

Appeal allowed.

Solicitors for the appellants: *S. M. Yong & Co.*

TRUSTEE OF CHETTIAR TEMPLE v. KEHAR SINGH.

[C. A. (Pretheroe, Ag. C.J., Murray-Aynsley, C.J. (S) Taylor, J.) November 2, 1953]

[K.L. — F.M. Civil Appeal No. 18 of 1953]

Practice and Procedure — Plaintiff instituting action as "Trustee of the Chettiar Temple" — Civil Procedure Code, s. 42(1) — Irregularity.

This was an appeal from a judgment of the High Court varying a decision of the Magistrate's Court in a Suit for arrears of rent. The material facts were that the appellant was the trustee of a temple and some outhouses — one of the latter was leased to the respondent and the dispute concerned the liability to effect repairs to the outhouse. Also it was alleged that the rent was in arrears. The appellant instituted the action as "Trustee of the Chettiar Temple" and not in his own name. During the course of the appeal it emerged that the trustee changes annually and that the then trustee who instituted the action was no longer the trustee.

Held: the proceedings in this case have been completely irregular from the start and must be set aside.

Case referred to :—

(1) *M. M. Ally & Co. v. Chellammah* (1948) M.L.J. 202.

CIVIL APPEAL.

D. G. Ironside for the appellant.

Respondent in person.

Cur. Adv. Vult.

Pretheroe, Ag. C.J. : — This is an appeal from the High Court where, also on appeal, that Court varied a decision of the Magistrate's Court.

The material facts are that the appellant was the trustee of a temple and some outhouses. One of the latter was leased to the respondent and the dispute concerned the liability to effect repairs to the outhouse. Also it was alleged that the rent was in arrears.

The appellant instituted the action as "Trustee of the Chettiar Temple" and not in his own name. During the course of the appeal it emerged that the trustee changes annually and that the then trustee who instituted the action is no longer the trustee. Sub-section (1) of section 42 of the Civil Procedure Code requires that the name and description of the plaintiff shall be given and the third sub-section of that section provides that, where the plaintiff sues in a representative capacity, the plaint shall show that he has an existing interest in the subject matter.